United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Original 76-6122

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

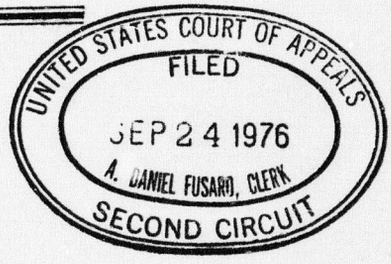
SECRETARY OF THE INTERIOR, *et al.*,
Defendants-Appellants,

v.

COUNTY OF SUFFOLK, *et al.*,
Plaintiffs-Appellees.

On Appeal from the United States District Court For the Eastern District of New York

REPLY BRIEF OF APPELLANTS NATIONAL OCEAN INDUSTRIES ASSOCIATION, ET AL.



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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANTS NATIONAL OCEAN INDUSTRIES ASSOCIATION, ET AL.

The appellees have filed three separate briefs in response to appellants' opening briefs. 1/ Given the limited time and space available to us, we cannot respond to each of the contentions which appellees have raised, particularly since they have sought to defend Judge Weinstein's August 13 order on many theories which he specifically rejected in the opinion embodying that order. We will, however, deal here with what we perceive to be the principal issues raised by appellees, and will demonstrate that none of their contentions can sustain Judge Weinstein's August 13 order.

1/ Appellee, State of New York, in disregard of this Court's August 16th order, has failed to file a brief by September 23, as it was directed to do. Desirous of filing a timely reply brief sufficiently prior to the oral argument of this case to allow the Court the opportunity to examine it, appellant, NOIA, files this reply brief in response to the briefs of Suffolk and Nassau Counties and NRDC. NOIA respectfully reserves the right to file a supplemental reply brief to the brief of the State of New York following NOIA's receipt of that brief.

I. THE CLAIMS WHICH JUDGE WEINSTEIN REJECTED

As indicated in our opening brief (NOIA Br. 7-8) and as clearly evidenced by Judge Weinstein's opinion, the appellees below raised virtually every conceivable issue (except the one relied upon by Judge Weinstein in issuing his August 13 injunction) to attempt to demonstrate the invalidity of the NEPA impact statements underlying Sale No. 40. Once again in this Court, appellees seek to rely upon those issues to justify an injunction against the sale. (The very prominance given to the rejected theories in appellees' briefs stands as strong evidence that appellees' are acutely concerned that Judge Weinstein's holding on the pipeline/tanker issue cannot withstand appellate scrutiny.)

We cannot begin to respond to all the factual contentions made by the appellees in this regard, except to observe that the entire 2645-page transcript of the evidentiary hearings and the hundreds of exhibits received in evidence below dealt principally with these NEPA contentions. Unlike the rationale utilized by the lower court in issuing its injunction, which was injected into the case after the close of the evidentiary aspects of the proceeding (NOIA Br. 9-10) and was not the subject of any evidence offered at trial by the plaintiffs (NOIA Br. 48-50), Judge Weinstein's decision against the

plaintiffs on all of these other NEPA issues arose out of his direct exposure to the extensive evidence put on by both sides and represented his considered judgment as to the weight of the evidence in this case, a matter not open to the de novo review here which appellees' contentions seem to expect.[1/]

A further basis for rejecting the other NEPA contentions advanced by the appellees arises out of the fact that many plaintiffs over the past three years have unsuccessfully attacked a number of similar environmental impact statements for OCS sales under much the same theories and contentions advanced by plaintiffs here. See e.g., Sierra Club v. Morton (MAFLA), 510 F.2d 813, 818 (5th Cir. 1975).[2/] That fact, coupled with the uncontradicted testimony of several of the witnesses below (Tr. 1959-60, 2218) that the impact statement for Sale No. 40 was substantially superior to those published by the Department for those earlier sales, provides further, indeed almost conclusive, support for Judge Weinstein's determination that appellees had not shown a probability of success on the merits with respect to the pursuit of those theories.

1/ In NOIA's opening brief, we argued that this Court should utilize a liberal standard of review in passing upon the propriety of Judge Weinstein's preliminary injunction. (NOIA Br. 20-21). Further supporting that argument is the fact that Judge Weinstein's ruling upon the determinative issue in this case was grounded solely upon his analysis of the impact statements and the legal principles determining their adequacy. This Court is entitled to exercise a far more liberal standard of review in passing upon a preliminary injunction entered upon this basis, than it is in determining the propriety of the conclusions reached by the trial court on the basis of the testimonial evidence, which he rejected, in dealing with appellees' own claims. San Filippo v. United Bro. of Carpenters, 525 F 2d 508, 511 (2d Cir. 1975).

2/ See also Alaska v. Kleppe, 9 E.R.C. ____(D.D.C.Aug. 13,1976),

(footnote continued)

Additionally, as shown in NOIA's opening brief (pp. 36-46), Judge Weinstein's review of the EIS was hinged upon an expansive view of NEPA which contemplates a most rigorous application of that statute. Quite clearly, then, he did not adopt a "crabbed" view of NEPA in rejecting the appellees' many theories as to the inadequacy of the EIS.

Moreover, as the transcript of proceedings and the lower court's order show, Judge Weinstein indulged in a virtual de novo review of the evidence which the appellees placed before him in concluding that they had failed to show the inadequacy of the impact statements in this case -- a far more liberal measure of judicial review than appellees were entitled to under NEPA. For under the "rule of reason", courts are not to indulge in de novo review of impact statements.[3/] Instead, a

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(footnote continued)

on appeal, D.C. Cir.; Southern California Association of Governments v. Kleppe, 8 E.R.C. 1922 (D.D.C. 1976); California v. Morton, 404 F. Supp. 26 (C.D. Cal. 1975), on appeal, 9th Cir.; Public Citizen v. Morton, (D.C.C. Civ. No. 74-739, 1975), all of which are discussed in NOIA's opening brief at pp. 17-20.

3/ Compare Ethyl Corp. v. EPA, ___ F.2d ____, 8 E.R.C. 1785, 1836 (D.C. Cir.), cert. denied, ___ U.S. ____ (1976) (opinion of Bazelon, C.J., joined by McGowan, C.J.):

> "The process of making a de novo evaluation of the scientific evidence inevitably invites judges of opposing views to make plausible-sounding, but simplistic judgements of the relative weight to be afforded various pieces of technical data.
>
> * * *

(footnote continued)

court should ask only whether an impact statement was "compiled with objective good faith;"[4/] it should ask whether reasonable efforts were made to arrive at a decision via "rational, practical and principled conclusions upon the basis of reasonable available evidence;"[5/] it should "recognize that many of these more esoteric battles must largely be won or lost at the agency level."[6/]

Finally, because of the prominance with which alternatives to the proposed action are discussed in the Suffolk County brief, we note the holding of NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972), that a decision-maker must consider only reasonable and feasible alternatives to the proposed action, not every conceivable alternative which might leap to the mind of imaginative counsel. The EIS for Sale No. 40 sets out at length all

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(footnote continued)

> "[I]n highly technical areas, where [a court's] understanding of the import of the evidence is attentuated, [its] readiness to review evidentiary support for decisions must be correspondingly restrained."

4/ Sierra Club v. Morton, (MAFLA), supra, 510 F.2d at 819.

5/ Citizens for Safe Power v. Nuclear Regulatory Commission, 524 F.2d 1291,1297 (D.C. Cir. 1975).

6/ Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1094 (D.C.Cir. 1975). See also Kleppe v. Sierra Club, 44 U.S.L.W. 5104(June 2[illegible], 1976).

feasible alternatives to carry out the national policy which Sale No. 40 was designed to implement -- the goal of providing additional domestic sources of energy to satisfy this Nation's energy requirements (II EIS 502-90) -- including energy conservation (id. at 533-36), the expansion of other domestic oil and gas supplies (id. at 537-39), as well as the use of other non-oil/gas domestic sources of energy. The EIS even considers alternatives -- oil/gas imports (id. at 563-67) -- which would not further the policy of energy self-sufficiency.

The criticism levelled by appellees with respect to alternatives really amounts to a quarrel with the substance of the Secretary's decision,[7/] a matter which the Supreme Court and this Court have declared lies outside the judicial review permitted by NEPA:

> "Neither the statute [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions . . . . The only role for a court is to insure that the agency has taken a 'hard look'

7/ The fact that the Suffolk County argument focuses upon the "decisional documents" -- e.g. the PDOD's -- which Judge Weinstein admitted into evidence over the Government's objection (Tr. 102, 104), demonstrates quite clearly its attempt to attack the substance of the Secretary's decision, rather than the adequacy of the EIS. Although the matter will be reserved for any appellate proceedings that may arise after entry of final judgment in this case, we note here the error in admitting such documents into evidence. See, United States v. Morgan, 313 U.S. 409 (1941); National Nutritional Foods Ass'n v. FDA, 491 F. 2d 1141 (2d Cir. 1974); Montrose Chemical Corp. v. Train, 491 F. 2d 63 (D.C. Cir. 1974).

> at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" Kleppe v. Sierra Club, 44 U.S.L.W. 5104, 5110 n. 21 (June 28, 1976) (emphasis supplied). 8/

To the extent the alternatives argument can be understood in traditional NEPA terms, it is clear all reasonable alternatives were adequately discussed in the impact statements, particularly in the light of the unacceptability of imports in implementing national policy and the, at best, speculative and uncertain nature of the plaintiffs' evidence concerning the sufficiency of other domestic oil/gas supplies and the conservation option. 9/

8/ This principle had been essentially adopted by this Court five years ago when it held that:

> "[NEPA] does not require that a particular decision be reached but only that all factors be fully explained. The eventual decision still remains the duty of the responsible agency." Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 481 (2d Cir. 1971).

9/ We also note Suffolk County's misstatement of the record with respect to two of the "alternatives" discussed in their brief. Contrary to its contention, the alternative of separating exploration and development is explicitly discussed in the impact statement for the accelerated program (III PEIS 350-52), as well as in the PDOD for that program, which the appellees themselves introduced into evidence in this case (JA 945, 983-986). Also contrary to the representations of Suffolk County, Judge Weinstein directly dealt with, and rejected, the "anti-competitive" contentions of Suffolk County. (Tr. 2634, see also Tr. 2665).

II. APPELLEES" CONTENTIONS AS TO THE PURPORTED NEPA VIOLATION RELIED UPON BY JUDGE WEINSTEIN

From the discussion of the NEPA and other theories which were rejected by Judge Weinstein, we return to the subject of our opening brief -- the Department's purported violation of NEPA by inadequately recognizing that state and local governments have authority over the placement of pipelines and by erroneously resting upon the premise that pipelines, not tankers, would be used to land sale No. 40 oil. While each of the appelles makes an effort to defend the lower court's order under this rationale, it is readily apparent that those efforts have not succeeded.

First, appelles have failed to identify any support in the record of this proceeding to sustain Judge Weinstein's conviction that the threat of a state veto of the placement of oil pipelines was so real that the EIS could be invalidated and the proposed federal action enjoined solely because of this issue. While appellees try to make the most of the evidence received at trial and of the Mid-Atlantic States' comments made during the administrative proceedings held prior to Sale No. 40 concerning the impacts of the sale,

the inescapable fact remains that no witness testified and no document recited that any of the States had taken the position that they would veto the placement of pipelines on State lands or in State waters.

Appellees, NRDC and Nassau County, for example, discuss at length the testimony of witnesses for both sides concerning, the on-shore impacts of Sale No. 40 in an attempt to leave the impression that such testimony supports Judge Weinstein's hypothesis that the States will exercise veto powers against pipelines.[10/] But Dr. Mitchell, NRDC's "expert" concerning the EIS's discussion of on-shore impacts (Tr. 426-33), who testified that he studied the impact statements bearing

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10/ NRDC even goes so far as to argue that Judge Weinstein found that the Department's assumptions concerning the use of pipelines were "probably wrong." (NRDC Br. 23). Judge Weinstein found no such thing; his only criticism of the EIS was that it failed to analyze existing state law and to discuss whether pipelines could or would be vetoed by the states. Nothing in his opinion, nor in the record, provides the slightest support for the proposition that the Mid-Atlantic states "probably" would veto pipelines.

Similarly evidencing the weakness of its position, NRDC attempts to reverse the burden of proof with respect to the pipeline issue by arguing that there was "no evidence to indicate that a state or locality . . . will not opt for strenuous regulation and restriction," such as a ban against pipelines. (NRDC Br. 46) But the inadequacy of the record as to the issue upon which Judge Weinstein rested the decision cannot be cured by such legerdemain. It was the movants for the preliminary injunction who had the burden to provide evidence supporting the legal theories underlying the grant of that motion. In any event, the silence of the Mid-Atlantic States during the administrative proceedings concerning their intent to veto pipelines does provide evidence that they have no present intention of opposing the landing of pipelines. (See NOIA Br. 50-55).

upon Sale No. 40 as well as other related documents (Tr. 436-43), never once criticized their adequacy with respect to the recognition of state jurisdiction to control OCS-related land uses, nor did he testify that the possible veto of pipelines had been inadequately considered. Instead, his testimony concerned the EIS's general consideration of on-shore, land use impact, a matter which NRDC asserts "everyone else [but the writers of the EIS] believes" to be more severe than indicated in the EIS. (NRDC Br. 39) We do not know what "everyone else believes" about this matter. We do know, however, that Judge Weinstein rejected the claimed inadequacy of the EIS, insofar as it dealt with the issue of land use impact. 11/ (Tr. 2732-33).

Basically (albeit sub silentio) conceding that the discussion of the state/local jurisdiction pipeline/tanker issue that appears in both the EIS for Sale No. 40 and the PEIS for the accelerated program is so copious that it cannot be dismissed as "inadequate," 12/ appellees climb to still more rarified heights of abstraction in critizing the EIS in searching for support of Judge Weinstein's order. For example, NRDC states that the EIS should have considered the

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11/ The court also rejected the "cumulative impact" argument now advanced by NRDC (NRDC Br. 42-44), in support of its attempts to shore up the record with respect to the issue upon which Judge Weinstein actually rested his decision.

12/ To be sure, the EIS is criticized for not saying more

(footnote continued)

possibility that "very dirty old converted tankers" might be used should the states veto non-pipeline, on-shore facilities (NRDC Br. 16);[13] that it should have dealt with the possibility that, notwithstanding the acute natural gas shortage in the northeast, gas from the Sale No. 40 area might simply be "pumped back down the wells" if pipelines are vetoed (Id.);[14] that "down-stream petrochemical plant[s]" might be vetoed, even if pipelines are not, thus forcing reassessment of the economic feasibility of pipelines (Id. at 17); etc.[15]

(footnote continued)

about state and local jurisdiction over land use. But that very criticism -- for example, NRDC's observation that of the many, many state statutes referred to by Judge Weinstein in the 120-page appendix to his opinion, four (including the New Jersey Hackensack Meadow Reclamation and Development Act) are not mentioned (NRDC Br. 31 n. 1)--shows the limits of appellees' position.

13/ This contention assumes that the Department is totally irresponsible in regulating OCS operations, a position which is flatly inconsistent with the record in this case and finds no support in the opinion of Judge Weinstein. (See NOIA Br. 42-43).

14/ The ethereal quality of NRDC's suggestion that this absurd result might occur is further demonstrated by the fact that oil and gas from OCS areas are carried in entirely separate pipeline systems (II EIS 17-18), that Judge Weinstein was principally concerned with the spills which could arise from ruptured oil pipelines and not gas pipelines (Order p. 55, J. A 65, Tr. 2637), and that the veto of oil pipelines would not, therefore, necessitate cessation of natural gas production in the Sale No. 40 area.

15/ NRDC also complains of the failure to discuss the storage tanks that would be necessitated in tanker operations and the potential "funneling" of OCS production to receptive jurisdictions. (NRDC Br. 17). Storage tanks are, however, specifically discussed in the PEIS in connection with its analysis of tanker operations, (I PEIS 63, 75, 83), while the possibility of "funneling" cannot be dealt with in the abstract absent indications by Mid-Atlantic states concerning their intention to veto OCS operations.

It is claimed that there is "very great likelihood of such confrontation[s]" (NRDC Br. 30) and that the EIS can be invalidated for failing to discuss these contingencies, and Judge Weinstein is praised for his "prescience" in foreseeing them when the Government did not (Id at 47). But nowhere was the "likelihood" of these confrontations discussed in the evidence submitted to Judge Weinstein (nor, for that matter in the administrative comments, pleadings, or briefs filed by the Long Island plaintiffs, New York or NRDC), and none of the witnesses offered by the plaintiffs criticized the EIS for its failure to deal with these "confrontation[s]."

Finally, simply choosing to ignore the fact that the EIS did relate the exercise of state jurisdictions over land use to OCS operations by, for example, dealing extensively with the impact of tanker usage should pipeline vetoes be cast,[16/] appellees argue that the EIS failed to take the essential step of recognizing the manner in which the exercise of state jurisdiction could affect OCS operations. This contention places in sharp focus the image of NEPA which underlies appellees' position in this Court. Not content with the requirements of the statute which Judge Weinstein articulated -- e.g., an analysis of existing state laws, which required over 100 pages of appendix to his opinion simply to reproduce --

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16/ (See II EIS 30-32; I PEIS 60-72; II PEIS 26-55, 56-60, reciting the sizes, drafts, types of ship design, and methods of oil transfer for tankers and barges; "through put spillage rates" associated with the delivery of OCS oil via tankers; impacts of oil spills resulting from tankers and tanker accidents; the likelihood of spills, both smaller than and larger than 1,000 barrels, resulting from OCS operations' employment of tankers, etc.)

appellees seek to support Judge Weinstein's order on the basis of the effects of those statutes if the states intend to enforce (or in some cases amend to strengthen) them to bar, not only pipelines but the many other types of OCS on-shore facilities. NEPA has never been construed by any court to require discussion of such remote and hypothetical matters. See, NRDC v. Morton, 458 F. 2d 827 (D.C. Cir. 1972); NRDC v. Callaway, 524 F. 2d 79 (2d Cir. 1975).

Appellees are thus reduced to arguing the obvious proposition that the impact statements could have said more about the issue upon which Judge Weinstein found them inadequate. Of course they could; all NEPA impact statements could always say more about every issue which they address. But the "rule of reason" does not allow for injunctions against major federal actions on this basis.

Indeed, in one of the only other OCS leasing cases that has come under appellate scrutiny, the D.C. Circuit defined the "rule of reason" in terms which seemed to anticipate and require rejection of the kind of arguments made by appellees here. Recognizing "that the resources of energy and research -- and time -- available to meet the nation's needs are not infinite," that court mandated that NEPA "must be construed in the light of reason"

so as not to require extended discussion of the kind of remote and speculative hypotheses, such as underlies the lower court's order here. NRDC v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972)

To the same effect, other courts have held that NEPA does not require that every conceivable aspect of a project be discussed in exhaustive detail nor does it "require that each problem be documented from every angle to explore its every potential for good or ill."[17/] The rule of reason recognizes that an agency often must, like the Department did here, act on the basis of current available information, rather than seek to develop what may be virtually unavailable data concerning such speculative matters as the future enforcement strategies of the Mid-Atlantic States with respect to pipeline placements:

> "There is no suggestion that the available facts were ignored by the requisite agency . . .. It was for the Commission to arrive at rational, practical and principled conclusions upon the basis of reasonably available evidence." Citizens for Safe Power v. Nuclear Regulatory Commission, 524 F.2d 1291, 1297 (D.C.Cir. 1975). [18/]

None of the cases cited by the appellees in their briefs support the position that an impact statement, like the one published by the Department here, can be invalidated

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17/ Sierra Club v. Froehlke, 345 F. Supp. 440, 444 (W.D. Wisc. 1972). See also Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1975); Maryland National Capital Planning Comm. v. Schultz, 5 E.R.C. 1340 (D.D.C. 1973).

18/ See also Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1086 (D.C. Cir. 1975); Sierra Club v. Morton (MAFLA), supra.

in a judicial NEPA attack merely because more could have been said about a particular aspect of the proposed federal action. Most of the cases upon which they rely have nothing whatever to do with claims that the impact statements contained inadequate data.[19/] The few which do address that issue either involved situations where there was such patently inadequate data as to leave no fair room for argument concerning the reasonableness or good faith of the federal decisionmaker or there was no data at all with respect to the environmental impact of the challenged federal action.[20/]

In short, plaintiffs have failed to cite a single case striking down an EIS for a proposed federal action where

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19/ See, e.g., Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109 (D.C.Cir. 1971).

20/ In Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2d Cir. 1972), for example, the impact statement for a major highway project was two and one half pages long and contained no discussion of such issues as traffic volume, noise and air pollution. In Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1972), an EIS for a public housing project devoted nine lines to drainage problems, notwithstanding the susceptibility of the area to floods, and failed to discuss alternatives to the project. And, in Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378 (2d. Cir. 1975), the EIS failed, inter alia, to consider the impact on the surrounding neighborhood of the inclusion of public housing units in a major federal construction project.

the federal decisionmaker compiled (as even appellees must be compelled to admit the Department did here) a substantial EIS containing a significant amount of information as to the disputed issue. A fortiori, there is no justification under NEPA for invalidating the EIS for Sale No. 40, in the light of the speculative and hypothetical nature of the issue relied upon by Judge Weinstein in entering his August 13 order. Having devoted many pages, indeed whole sections, in both the EIS and PEIS to an issue as remote and speculative as the potential exercise of veto authority by state and local governments over the landing of pipelines and the consequent use of tankers, the Department fully and faithfully complied, to borrow a phrase from Judge Weinstein's order, with "both the spirit and the letter of NEPA." (Order, p. 31, JA 40).

III. UNDER ANY CIRCUMSTANCES THE DISTRICT COURT'S AUGUST 13 PRELIMINARY INJUNCTION ORDER SHOULD BE VACATED

We have developed in our opening and the foregoing portions of our reply brief what we respectfully submit is an overwhelming argument as to the adequacy of the NEPA impact statements underlying Sale No. 40. In the light of the facts that the issuance of the lower court's preliminary injunction order came after "full discovery [and] full trial," that Judge Weinstein rendered a 79-page opinion seeking to justify his order, and that the parties have briefed, in full,

the substantive issues underlying that order, we respectfully submit that this Court should give the lower court and the parties the benefit of its view as to NEPA theory relied upon below to enjoin Sale No. 40. We believe that in so doing this Court will find that Judge Weinstein erred in holding that appellees have shown a probability of success on the merits and will, accordingly, vacate his August 13 order.

However, for the sake of completeness and because Appellees now explicitly urge that the lower court's order should be affirmed and Sale No. 40 should be rescinded, we now turn to a refutation of that contention which assumes, solely for purposes of argument only, that Judge Weinstein properly identified a NEPA violation in issuing his August 13 Order.

A. The Appellees Did Not Satisfy Their Burden of Justifying a Preliminary Injunction

While NEPA provides a new statutory basis for injunctions against proposed actions by federal agencies,[21/] it has not altered the traditional equitable requirements for granting preliminary relief. Ohio ex rel. Brown v. Callaway, 497 F.2d 1235, 1240 (6th Cir. 1974); Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033 (8th Cir. 1973),

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2 / See, e.g., Sierra Club v. Volpe, 351 F.Supp. 1002 (N.D. Cal. 1972); Environmental Defense Fund v. Tennessee Valley Authority, 349 F.Supp. 806 (E D.Tenn.), aff'd 468 F.2d 1164 (6th Cir. 1972).

aff'g,348 F.Supp. 338, 356 (W.D.Mo. 1972). See also Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 508 F.2d 927 (2d Cir. 1974); Cf. City of New York v. United States, 357 F.Supp. 150 (E.D.N.Y. 1972) (three-judge court). A preliminary injunction remains an extraordinary remedy which is not to be "loosely or casually" allowed "whenever a claim of 'environmental damage' is asserted." Aberdeen & Rockfish R.R. v. SCRAP, 409 U.S. 1207, 1217 (1972) (Burger Circuit Justice).

Accordingly, in NEPA, like other litigation, the basic justification for affording this remedy is the preservation of a court's ability to make a meaningful decision on the merits. Wright & Miller, Federal Practice & Procedure: Civil § 2947. The burden of persuasion thus remains on the plaintiff to show, inter alia, a substantial threat of irreparable harm if the injunction is not issued. See generally, DiGiorgio v. Causey, 488 F.2d 527 (5th Cir. 1973); Blackshear Residents Organization v. Romney, 472 F.2d 1197 (5th Cir. 1973).

To be sure, preliminary injunctions have often been granted in environmental litigation.[22/] "In all such cases, however, preliminary injunctions have been issued not merely because some impact upon the environment has been alleged, but

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22/ See, e.g., West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Boston Waterfront Residents Association, Inc. v. Romney, 343 F.Supp. 89 (D.Mass 1972); Scherr v. Volpe, 336 F.Supp. 882 (W.D. Wisc. 1971) aff'd 466 F.2d 1027 (7th Cir. 1972).

because the threatened harm has been properly shown to be irreparable, in accordance with the usual test for a preliminary injunction." Canal Authority v. Callaway, 489 F.2d 567, 574 (5th Cir. 1974). Thus, preliminary injunctions in NEPA cases have been denied where plaintiffs have failed to prove their own irreparable injury. Canal Authority v. Callaway, supra; Environmental Defense Fund v. Hardin, 325 F.Supp. 1401 (D.D.C. 1971).[23/]

The decision below ignores these basic principles. Judge Weinstein found the EIS for Sale No. 40 to be adequate as to the myriad issues litigated at trial. The only defect discovered by the district court was the purported failure of the EIS to evaluate the possibility that, several years from now, one or more coastal states might refuse to permit oil to be transported by pipeline, thus requiring the use of environmentally less desirable tankers. The Court then, in effect, presumed that this violation of NEPA "itself constitutes sufficient irreparable harm to require issuance of a preliminary injunction." (Order, p. 73, JA 83).

23/ In Canal Authority v. Callaway, supra, the federal government proposed to drain a lake, At the request of the canal authority, the district court issued a preliminary injunction which blocked this action on the grounds, inter alia, that (1) the drainage had an adverse effect on wildlife habitat, fisheries, aesthetics and recreation and that (2) those opposing the injunction had failed to show that a preliminary injunction should not issue. The Fifth Circuit reversed, holding that the district court had failed to find that the alleged harm to the plaintiff was "irreparable" and noting that "NEPA, though relevant to the merits of the present case, has not altered the traditional tests for a preliminary injunction that are to be applied on remand." Id. at 578

But this ipso facto approach is totally devoid of any explicit finding of actual, let alone irreparable, harm to the plaintiffs. Simply stated, it fails to explain why the potential transportation of oil by tanker no sooner than 1979 or 1980 required a preliminary injunction in 1976.[24/] Indeed, the argument of Suffolk County as to irreparable injury (Br. 69-72) -- which stresses only the NEPA theories rejected by the lower court -- illustrate the court's error, as do the very cases cited by it in support of the "presumption" of irreparable harm. In Natural Resources Defense Council v. Morton, 337 F. Supp. 167 (D.D.C. 1971) aff'd, 458 F.2d 827 (D.C. Cir. 1972), a 67-page EIS wholly failed to discuss certain alternatives to the proposed OCS sale, some of which, if viable, could have done away with the necessity of the sale itself. Such defects in an impact statement go to the very essence of the project. Obviously in those circumstances, were the project to commence and later be cancelled, any resulting harm to the environment would have been completely unnecessary. [25/]

24/ Judge Weinstein found, based on the evidence of record, that the production phase of Sale No. 40 -- the first instance when pipelines or tankers might be used to land Sale No. 40 oil -- would not occur until at least three years after the issuance of the leases themselves. (Order p. 76, JA 86).

25/ Izaak Walton League v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1972); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972): and Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164 (6th Cir. 1972), which were also cited below are similarly distinguishable. In Izaak Walton League, no impact statement was prepaid. In Scherr, the injunction was issued because

(footnote continued)

In the instant case, by contrast, Judge Weinstein did not find that alternatives to Sale No. 40 were not fully explored, that the project might be unnecessary, or that environmental issues going to the essence of the project had not been adequately considered in the EIS.[26/] Indeed, he

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(footnote continued)

there had not been adequate NEPA consideration of any phase of the project. And in Environmental Defense Fund, the district court made specific and detailed findings as to how irreparable injury would immediately result unless preliminary relief was granted. Unlike the court below, the district courts in Scherr and Environmental Defense Fund, issued preliminary relief where it was necessary to avert an immediate danger posed by imminent or ongoing governmental action. Compare, York Committee v. NRC, 527 F.2d 812 (D.C.Cir. 1975).

26/ Judge Weinstein did suggest that the pipeline/tanker issue might affect the Department's tract selection for Sale No. 40:

> "Even if the states do not prohibit oil pipelines they may restrict their point of entry, requiring a landfall, for example, at the industrialized northern section of the New Jersey Coast or at the refinery areas in the tristate New Jersey-Delaware-Pennsylvania region. Such a decision would require a reconsideration of whether tracts other than those proposed in Sale No. 40 should be leased." (Order, pp. 66-67, JA 76-77) (emphasis supplied).

This observation seems to contemplate that the Department ought to await the development of state coastal zone plans prior to offering Sale No. 40 OCS tracts, a position squarely rejected by the lower court in other parts of its opinion. (Order pp. 47-53, JA 57-63). It also is contradicted by Judge Weinstein's holding that the NEPA violation which he perceived could be "speedily" corrected by the Department. (Order, p.77, JA 87). Finally, it ignores the fact that although the states were given an opportunity to participate in the tract selection process for Sale No. 40, they did not raise this issue. (NOIA Br. 51-52). Thus, Judge Weinstein's reference to the manner in which the NEPA violation he perceived relates to the tract selection process cannot sustain his injunction against the sale itself.

discussed in some detail the nation's deepening energy crisis and the corresponding need for new sources of oil and natural gas. He fully recognized that the sale was an integral part of the nation's energy policy. He did not seriously dispute that the sale would eventually take place; instead, he stated that the Department could "speedily" consider state law and policy and go forward with the sale (Order, p. 77, JA 87).

The lower court's only concern centered upon the methods of transportation of oil to shore several years from now, a danger far removed from the leasing decision which was the target of the court's injunction. But if Sale 40 exploration is successful and oil is eventually discovered (a big "if" in the light of the fact that no exploratory drilling activity has ever taken place in this part of the ocean), the Department would retain a variety of options to deal with the impact of a S 's veto of pipeline transportation.[27/]

In the first place, it seems unlikely, to say the least, that all of the Mid-Atlantic States would eschew the benefits of the CZMA, so that they could exercise their sovereign authority outside the context of that Act to veto

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27/ Of course, if no oil is discovered in the Sale No. 40 area, either because the area contains only natural gas or because it is altogether devoid of any hydrocarbons in commercial quantities, the pipeline issue hypothesized by Judge Weinstein would never arise. Judge Weinstein's injunction against the sale itself, however, would have prevented both industry and Government from determining whether any oil or gas underlies the area, a matter which, standing alone, is of great significance in the light of the need to obtain more information about the nation's energy resources.

pipelines. (See, NOIA Br. 55-60). Absent such concerted action by all of these States, the Department would retain the flexibility to direct pipeline corridors which would land Sale No. 40 oil in jurisdictions which were not hostile to pipelines.[28/]

Moreover, even assuming arguendo that all of the Mid-Atlantic States would veto pipelines, the Department could utilize the broad regulatory authority available to it to substantially mitigate, if not altogether eliminate, any adverse environmental impacts.[29/] The Department could consider publication of a separate impact statement as to Sale No. 40 development which would analyze alternative oil transportation methods--e.g.pipelines to other jurisdictions;alternate tanker techniques, etc. (See NOIA Br. 43; III EIS 44). Or the Department could consider the issuance of OCS operating orders (which govern lessee activities on OCS tracts) to require improved tanker

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28/ The State of New York, while not taking a position that it would bar pipelines, was the only Mid-Atlantic state which criticized the draft EIS for its failure to take this possibility into adequate account, and Judge Weinstein made much of the New York Wetlands Act in justifying the entry of his order. (Order p. 65, JA 75; Tr. 2722-28; JA 812-18). However, there has never been any suggestion that pipelines would be run from the Sale No. 40 area to New York. (NOIA Br. 52-53). This fact highlights the flexibility which the Department would retain with respect to the pipeline issue, should New York, for example, decide to prohibit the landing of Sale No. 40 oil in its jurisdiction.

29/ See NOIA Br. 42-43.

off-loading methods from OCS rigs. Indeed, the Department could even suspend the production of oil in OCS tracts pending issuance of such regulations and the implementation of such methods.30/

Finally, the position of appellee, NRDC, which "does not oppose offshore oil and gas development" (NRDC Br. 8) illustrates the lower court's error. NRDC says that it wants such operations to be conducted in an environmental-safe manner. However, the "options" which NRDC states would be precluded if the sale were to stand--stipulations in leases requiring pipelines; the imposition of strict liability on lessees for spills; and delaying development until state coastal zone management plans can be adopted (NRDC Br. 19-20)--all can be accomplished without disturbing Sale No. 40 itself.30a/ Lease stipulations have been imposed requiring the use of pipelines wherever they are feasible; legislation with respect to liability for oil spills does exist and new legislation can always be adopted to expand such liability, if necessary; there will be no development in the Sale No. 40 area until 1979, well after the mid-Atlantic states have ample opportunity to adopt Coastal Zone Management Plans. Thus, NRDC's own argument demonstrates the impropriety of Judge Weinstein's injunction against the sale itself.

Compounding the lower court's error as to irreparable injury was its disregard of the other factors which must be considered in issuing a preliminary injunction--i.e., whether such relief would result in substantial harm to others and whether it would disserve the public interest. As the NOIA intervention affidavits state, 31/ a substantial delay in Sale No. 40 would have resulted

30/ See Gulf Oil v. Morton, 493 F.2d 141 (9th Cir. 1973)

30a/ We have dealt with the tract selection option urged by NRDC in n. 26 at p. 21.

31/ These affidavits were admitted into evidence in the hearing on preliminary injunction motion. (Tr. 2513).

in the loss of tens of millions of dollars to both production companies, which had prepared to make bids on Sale No. 40 properties,[32/] and to the many support industries (and their employees) which would have faced severe adverse consequences had the sale been enjoined.[33/] By the same token, the witness statements offered in the Sale No. 40 administrative hearings (Def. Ex. MM) concerning the sale's promise of employment opportunities for local members of under-employed labor unions, relief to local businesses, provision of desperately needed energy to consumers, and other benefits to other members of

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32/ Judge Weinstein also took judicial notice of the "substantial outlaying of cash" necessary to prepare for OCS sale bids (Tr. 2797-98), which in this case totalled $3.5 billion, 20% of which (or $700 million) had to be deposited in cashier's checks with the Department at the time of the sale itself.

33/ Were the EIS for Sale No. 40 to be invalidated, appellees would doubtlessly seek to delay publication of a new revised impact statement by insisting upon a full range of administrative hearings and comment, not only upon the one issue as to which it was invalidated, but also as to their many other complaints against Sale No. 40. Compare Judge Weinstein's suggestion that

> "The hearings in this court on the NEPA statements, suggested a number of respects in which they can be improved. Since the Secretary will be enjoined from holding lease Sale No. 40 on August 17, 1976, the Department of Interior will have the opportunity to revise its NEPA documents, in light of the testimony in the hearing before this Court." (Order, p. 72, JA 82).

the public all revealed the severe adverse consequences that would attend an injunction against the Sale.

Even more significantly, the unambiguous national interest described in the many congressional, executive and judicial pronouncements concerning the need for an expeditious development of the nation's energy resources (See, NOIA Br. 12-15), coupled with the evidence here of the manner in which Sale No. 40 might begin to mitigate the critical natural gas shortage suffered by the Northeast, demonstrates that any significant delay in the sale would have severely harmed the public interest. Aside from asserting that the Government itself could undertake exploration of the Sale No. 40 area (a comment made without analysis of the Government's legal, fiscal, or organizational ability to conduct such operations, Order p. 76, JA 86), Judge Weinstein failed completely to deal with the effects that the issuance of his August 13 order would have upon the public interest in general.

This deficiency in the lower court's order is particularly striking with respect to the manner in which the development of the natural gas resources, which may underlie the Sale No. 40 area, could take place without raising any of the issues posed by Judge Weinstein with respect to state/local jurisdiction over oil pipelines.[34/] Such testimony as there was with respect to the matter, indicated that expert

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34/ Since under present technology pipelines are the only practical means for delivering gas from OCS areas, the vetoing of pipelines would halt gas development, rather than, as was the case with respect to oil, lead to environmentally less desirable transportation methods.

opinion concerning the potential hydrocarbons underlying the Sale No. 40 area indicates that the area is more likely to be gas-rich, rather than oil-bearing. (Tr. 2297). Despite these facts, Judge Weinstein's preemptive injunction against the sale itself would have totally prevented the development of Sale No. 40 hydrocarbons, whether gas or oil.

In short, even assuming arguendo that Judge Weinstein properly identified a NEPA violation in the course of issuing his August 13 order, that order was nonetheless invalid for its failure to adequately address the other issues which must be considered prior to the issuance of a preliminary injunction.

B. The Status Quo As Of Today Requires Vacation of Judge Weinstein's August 13 Order

Judge Weinstein's determination to enjoin Sale No. 40 was reached under circumstances that are quite different than those which now exist. Specifically, following this Court's August 16 order staying the lower court's injunction and the refusal of Mr. Justice Marshall to disturb that order, Sale No. 40 took place on August 17, as scheduled, resulting in the sale of leases on 93 of the 154 Sale No. 40 tracts at a price of $1.1 billion. The precise amounts which each of the successful bidders offered for the 93 tracts were announced at the time the sealed bids for the Sale No. 40

properties were opened and have been widely reported in the press. (See e.g., Wall Street Journal of August 19, 1976, p. 2). Thus, plainly, were the appellees to be given the relief which they now seek (but see p. 29 n. 36) and were the sale subsequently to be restaged, as contemplated by Judge Weinstein (Order p. 76, JA 86), following the Department's consideration of the state/local jurisdiction pipeline/tanker issue, the new Sale No. 40 would take place under circumstances that were unfair both to the original bidders, whose evaluations of Sale No. 40 tracts would have been exposed, and to the Federal Government, whose secret bidding system would have been compromised. 35/

35/ An affidavit attached to NOIA's brief in this Court with respect to its application to stay Judge Weinstein's order spelled out clearly and directly the effects of exposing bids in the manner discussed above:

> "Any such disclosure [of the information reflected in bids] . . . would have an extremely adverse effect on participants in the bidding process.
>
> "1. If the evaluation of tracts and prospects is revealed to competitors when the tracts are not awarded to high bidders, those companies who submitted high bids will suffer substantial and irreparable damage. If the tracts are put up at a future sale, competitors' bids and the pre-sale evaluations would be adjusted on the basis of knowledge of other bidders' proprietary data." (¶ 6, Aff. of J.R. Jackson, Exploration Department of Exxon Company, U.S.A.)

In the light of the type of NEPA violation found by Judge Weinstein below, there is no reason now even to consider taking action which would have these effects. At most, Judge Weinstein's decision would justify a "remand" of the Sale No. 40 EIS with respect to the state/local jurisdiction pipeline/tanker issue for reconsideration of whether to proceed with activities in the Sale No. 40 area. Only if the Department were to determine upon remand not to allow further activities in the Sale No. 40 area, would it be necessary to address the issue of rescission of Sale No. 40 leases.[36/] So long as the possibility remains that oil and gas exploration and production activities may eventually take place in the Sale No. 40 area, there is no need to deal with that question.

36/ Because of the Department's continuing regulatory authority over the OCS (See NOIA Br. 42-43) we will not deal in this brief with the recision issue, a question that was not addressed in this Court's August 16 order (JA 210) and that was only obliquely referred to in the opinion issued by Mr. Justice Marshall denying appellees' application to vacate that order (JA 212, 217).

Suffice it to say now that the argument advanced by NRDC in support of rescinding the sale is based upon the patently erroneously assumption that a defect in the NEPA process affects the Department's jurisdiction or authority under the OCS Lands Act to issue valid leases. However, the law is clear both that the OCS Lands Act provides the sole basis for determining the validity of OCS leases, (see Union Oil Co. v. Morton, 512 F.2d 743 (9th Cir. 1975); Gulf Oil Co. v. Morton, 493 F.2d 141 (9th Cir. 1973) and that NEPA does not vest either courts or

(footnote continued)

Thus, common sense and basic principles of fairness dictates that Judge Weinstein's order now be vacated. As might be expected, the Court's equity powers are flexible enough to achieve a just result under the present status quo.

(footnote continued)

agencies with authority to exceed the jurisdictional limits imposed upon them by pre-existing legislation, such as the OCS Lands Act. U.S. v. SCRAP, 412 U.S. 69 (1973); Aberdeen & Rockfish R.R. v. SCRAP, 422 U.S. 289 (1975); Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972); Pennsylvania v. FMC 392 F. Supp. 795 (D.C. Cir. 1975).

Quite apart from NRDC's error as to these substantive issues, a serious procedural question would be presented by any present attempts in this litigation to seek rescission of the Sale No. 40 leases. Specifically, there are now numerous third parties who have obtained leasehold interests on tracts in the Sale No. 40 area who are not parties to this litigation, and who are not represented by NOIA, an association which, contrary to the allusions of NRDC (Br. 1-2), is composed principally of individuals and independent businesses providing support for offshore operations. Since rescission of Sale No. 40 leases would obviously have severe adverse consequences upon these lessees, they may well be "indispensable" parties with respect to any litigation aimed at invalidating the Sale No. 40 leases. See Southern California Association of Governments v. Kleppe, 8 E.R.C. 1922, 1926 (D.D.C. 1976), where despite the presence of an association composed principally of oil production companies, the court held:

> "As explained earlier, these actions were originally filed just prior to Sale 35 and the preliminary injunction denied at the outset sought to enjoin that sale. The sale proceeded, however, as scheduled and oil companies who were successful bidders have obtained valuable rights to explore and develop properties off the outer continental shelf. Therefore, they have a significant interest in the outcome of this litigation . . . . The Court is not in a position to decide at this juncture whether the oil companies are indispensable parties or not."

A court of equity not only has the power to tailor relief to a given situation, but also it retains plenary power over its orders to revise them as conditions warrant. 7 Moore, Federal Practice ¶ 60.26[4]. "An injunction, though entered on the basis of evidence of past events, is operative in the future," Atlantic Richfield Co. v. Oil Chemical & Atomic Workers International, 447 F.2d 945, 948 (7th Cir. 1971) (Stevens, J.), requiring a court to take "corrective action" whenever "its prior orders threaten to foster rather than forestall irreparable harm." Consolidated Edison Co. of New York, Inc. v. Federal Power Commission, 511 F.2d 372, 378 (D.C. Cir. 1974) (footnote omitted).

The Supreme Court has long recognized these principles. See United States v. Swift & Co. 286 U.S. 106, 114-15 (1932):

> "We are not doubtful of the power of a Court of equity to modify an injunction in adaptation of changed conditions . . .. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need . . .. The result is all one whether the decree has been entered after litigation or be consent . . .. In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

See also, Milk Wagon Drivers Union v. Meadowmoor Dairie , 312 U.S. 287, 298-99 (1941); United States v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968).

This power to modify equitable decrees is available to both trial and appellate courts, whether dealing with interlocutory or final orders. See Consolidated Edison Co. of New York, Inc. v. FPC, supra, 511 F.2d at 378 where in modifying an earlier interlocutory order, the court held:

> "We believe that this court not only has equitable discretion to respond to changing circumstances, but has a responsibility to take corrective action when its prior orders threaten to foster rather than forestall irreparable harm."

See also, Natural Gas Pipeline Co. v. FPC, 128 F.2d 481 (7th Cir. 1942).

Here, in the light of the nature of the NEPA violation found by Judge Weinstein, of the manner in which that violation could be corrected via remand to the Secretary, and of the harm to individuals and to the nation that would arise out of any present attempts to cancel Sale No. 40, it is clear that, even if Judge Weinstein's injunction were proper as of August 13 when he entered it, this Court should not reinstate it today.

CONCLUSION

For all the reasons stated in NOIA's reply and opening briefs, this Court should vacate Judge Weinstein's August 13 order.

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September 24, 1976.

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for George Burrell Esq. being duly sworn, deposes and says that he is over the age of 21 years and resides at Levittown, New York

That on the 24th. day of September , 1976 he served the annexed Reply Brief upon

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in this action, by delivering to and leaving with said attorneys three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 24th. day of September, 1976

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4[illegible]
Qualified in Delaware County
Commission Expires March 30, 1977

Raymond J. Braddick